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The Honour of the Crown

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At the heart of Canadian Aboriginal Law is a mysteriously-named principle: "The honour of the Crown". This paper is about that principle, in an attempt to make it more accessible to lawyers and judges who would give it practical application in litigation.

I will refer extensively to the decision *Fort McKay First Nation v Prosper Petroleum Ltd*.[1] and in doing so I pay deep respects to my co-counsel on that case, the late Joe Arvay, QC, OC, who argued the cause magnificently in Edmonton on October 29, 2019. I sat in awe beside him as he persuaded a three-judge panel of the Alberta Court of Appeal to terminate a major oil industry project, based on the failure of the Government of Alberta to abide by the honour of the Crown. Joe passed away on December 7th 2020. He was a great lawyer who leaves an enduring influence on the Canadian legal system, and the Fort McKay case is just one example, among scores of profound successes during his career.

An Ancient Concept in a Modern Context

The principle of the honour of the Crown arose in the feudal, aristocratic, ancient beginnings of the Common Law itself.[2] [3] Thomas Hobbes, in *The Leviathan*, said:

> And as the power, so also the honour of the sovereign, ought to be greater than that of any or all the subjects. For in the sovereignty is the fountain of honour[4]

Lord Coke used the concept during the time of Shakespeare and Queen Elizabeth I:

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[1] 2020 ABCA 163 (*Fort McKay*).

[2] David M Arnot, 'The Honour of the Crown" (1996) 60:2 Sask L Rev 339 at page 340.

[3] James [Sake'j] Youngblood Henderson, "Dialogical Governance: A Mechanism for Constitutional Governance" (2009) 72 Sask L Rev 29 at page 52 footnote 115.

[4] Thomas Hobbes, *The Leviathan: or The Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil*, 4th ed (London: George Routledge and Sons, 1894) at page 89.

> *Secundum intentionem Regis, et non deceptionem Regis*; and when a literal and strict construction is made to make his grant void, *contra intentionem Regis*, it sounds in deceit of the King, and is a great indignity to him[5]

As it applies to Aboriginal law, the principle is found in the Royal Proclamation of 1763, and in the instructions given to Colonial governors. [6] [7] The British Crown advanced the concept that the government must act honourably towards vulnerable Indigenous peoples whose lands were being subject to occupation and colonization. This view of the original source of the concept is outlined by the Supreme Court of Canada in Wewaykum at paragraph 80:

> 80 This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically (recall, e.g., the reference in *Royal Proclamation, 1763*, R.S.C. 1985, App. II, No. 1, to the "great Frauds and Abuses [that] have been committed in purchasing Lands of the Indians"), but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct or ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E. J. Weinrib's statement, quoted in *Guerin*, *supra*, at p. 384, that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." See also: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574, *per* Sopinka J., at pp. 599-600; *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377, *per* La Forest J., at p. 406; *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99, *per* Wilson J., dissenting, at pp. 135-36. Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the "honour of the Crown": *R. v. Taylor* (1981), 1981 CanLII 1657 (ON CA), 34 O.R. (2d) 360 (C.A.), *per* MacKinnon A.C.J.O., at p. 367, leave to appeal refused, [1981] 2 S.C.R. xi; *Van der Peet*, *supra*, *per* Lamer C.J., at para. 24; *Marshall*, *supra*, at paras. 49-51. [8]

[5] *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a at 56b.
[6] William Playfair, *Political Portraits, in This New Aera: With Explanatory Notes, Historical and Biographical*. (London: C. Chapple., 1813) at page 126.
[7] In New Zealand the concept has roots in express instructions given to British treaty negotiators, see *New Zealand Maori Council v Attorney-General* CA 54/87 [1987] NZCA 60 at page 37 [*Maori Council*].
[8] *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para 80. Note – the SCC has revised this paternalistic view in Manitoba Metis – see below.

New Zealand has expressly embraced an honourable sovereign when interpreting the Treaty of Waitangi,[9] a foundational document governing the state. [10]

The United States, despite being a republic, has adopted a very similar concept. [11] American jurisprudence accords a unique trust relationship between Indigenous Nations and the American government.[12] Any ambiguities in treaties, agreements, statutes, and executive orders ought to be read liberally in favour of the Indigenous party.[13] This trust relationship "conveys the idea that courts should presume a benevolent intent on the part of Congress and other federal actors." [14]

What Is the Honour of the Crown?

The principle has two vague parts: "honour" and the "Crown".

"Honour", just like the American concept of "benevolent intent", is difficult to measure in a court of law. Can the word honour simply be replaced by more familiar legal concepts such as "duty" or "obligation"? Not quite, because the honour of the Crown does not form the basis of a cause of action, rather, it is the source of the duty or obligation that can itself form a cause of action.

Similarly, the word "Crown" is not intended to mean a golden hat, but rather, the government.

This use of archaic language makes the concept flexible, but challenging to apply.

A key aspect of the principle is a legal fiction – namely, that the Crown is always honourable, quite apart from the actions of any servants or agents of the Crown. While servants of the government may make mistakes, the Crown itself is presumed to remain unsullied. The Crown is the "fountain of honour" springing eternally, ready to be invoked in the right circumstances.

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[9] *Maori Council, supra* note 7 at page 37 (Cooke JA); at page 18 (Casey JA).
[10] *Paki v Attorney-General (No 2),* [2015] 1 NZSC 67 at para 186 [*Paki No.2].*

[11] *County of Oneida v. Oneida Indian Nation*, (1985) 470 U.S. 226, at page 247.
[12] *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) at page 30.
[13] *Winters v. United States*, 207 U.S. 564 (1908), at page 576 -77; *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1266 n. 7 (D.C. Cir. 2008) at para 7.
[14] NJ Newton et al. *Cohen's Handbook of Federal Indian Law,* 2012 ed (San Francisco: Lexis Nexis 2012) at page 116 – 117 [*Cohen's Handbook*].

What are the circumstances under which the principle can be invoked? The following is the essence of the law about the honour of the Crown as recently re-stated by the Alberta Court of Appeal in *Fort McKay*.

1. The honour of the Crown is a constitutional principle[15] that can give rise to duties.[16]

2. Some features of this principle are:

    (a) The purpose of the honour of the Crown is reconciliation.[17] Reconciliation of Aboriginal interests with Crown sovereignty is its ultimate purpose.[18]

    (b) The honour of the Crown "is always at stake in its dealings with Aboriginal peoples" but "is not engaged by every interaction."[19]

    (c) The honour of the Crown "and its attendant focus on reconciliation arise prior to questions of rights infringement, or even proof of Aboriginal rights claims."[20]

    (d) The "public interest" requires adherence to the honour of the Crown.[21]

    (e) The honour of the Crown "attaches to the implementation of its constitutional obligations"[22] and "speaks to *how* obligations that attract it must be fulfilled."[23]

    (f) In treaty areas the principle "infuses the performance of every treaty obligation."[24]

A broad range of duties arise from the honour of the Crown. The principle "will give rise to different duties in different circumstances."[25] Here are seven duties explicitly mentioned in the *Fort McKay* case. (Most of these duties had already been prominently outlined by the Supreme Court of Canada in Manitoba Metis).[26]

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[15] *Fort Mckay, supra* note 1 at para 73.
[16] *Ibid* at para 53.
[17] *Ibid* at para 74 – 75.
[18] *Ibid* at para 83.
[19] *Ibid* at para 54.
[20] *Ibid* at para 55.
[21] *Ibid* at para 65.
[22] *Ibid* at para 76.
[23] *Ibid* at para 54.
[24] *Ibid.*
[25] *Ibid*.
[26] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para 73 – 74.

(a) "a fiduciary duty"[27]

(b) "a duty to consult"[28]

(c) a duty of "honourable negotiation and the avoidance of the appearance of sharp dealing"[29]

(d) a duty to "to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples"[30]

(e) "requires negotiations leading to a just settlement of Aboriginal claims"[31]

(f) "requires that the Crown (1) take a broad purposive approach to the interpretation of the promise, and (2) act diligently to fulfill it"[32]

(g) "requires the Crown to endeavor to ensure its obligations are fulfilled"[33]

The *Fort McKay* case uses the following ways of describing how the honour of the Crown might not be followed:

(a) Failure to take "into account" the honour of the Crown[34]
(b) Failure to "follow" the honour of the Crown[35]
(c) Whether the government action "engages" the honour of the Crown[36]
(d) Did the government "fail to consider" the honour of the Crown[37]
(e) Does the implementation of a treaty "maintain" the honour of the Crown and a mutually respectful long-term relationship[38]
(f) Whether the proposed industrial project "implicates" the honour of the Crown[39]
(g) Whether the honour of the Crown "is implicated by" treaty implementation issues[40]

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[27] *Fort Mckay, supra* note 1 at para 53.
[28] *Ibid*.
[29] *Ibid*.
[30] *Ibid.*
[31] *Ibid* at para 55.
[32] *Ibid* at para 76.
[33] *Ibid*.
[34] *Ibid* at para 64 – 65.
[35] *Ibid.*
[36] *Ibid* at para 54, 70.
[37] *Ibid* at para 3, 28, 66.
[38] *Ibid* at para 30.
[39] *Ibid* at para 60, 65.
[40] *Ibid* at para 30, 54.

(h) Whether a Crown promise "attracts" the honour of the Crown[41]
(i) The Crown has responsibility to ensure that the honour of the Crown is "upheld"[42]

The Honour of the Crown is not a cause of action.

The honour of the Crown "is not an independent cause of action."[43]. While the honour of the Crown is always "at stake" in its dealings with Aboriginal peoples, it "is not engaged by every interaction."[44] Dishonourable transgressions are not actionable in themselves. Rather, these errors and shortcomings on the part of the Crown lead to breaches of duties. It is the breach of a duty which is actionable.

The honour of the Crown is not a procedural tool. While there is and should be honour during the litigation process, thus far, the honour of the Crown has little legal traction regarding the conduct of government during a lawsuit. It is "impossible to conceive of how the conduct of one party to the litigation could be circumscribed by a fiduciary duty to the other."[45] Accordingly the Crown can use all procedural tools available to it under the applicable rules of court, including equitable defences, laches and limitations.[46] Governments in Canada have recently been motivated to make self-imposed rules to shape the honourable conduct of litigation with Indigenous peoples, as in the 2018 Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples.[47]

Despite ample comparisons to it, the honour of the Crown is not a fiduciary relationship, although fiduciary duties may arise from it. The Supreme Court's most recent re-statement is that the honour of the Crown "did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept." [48]

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[41] *Ibid* at para 54.
[42] *Ibid* at para 47.
[43] *Fort Mckay, supra* note 1 at para 54.
[44] *Ibid.*
[45] *Canada v. Stoney Band*, 2005 FCA 15 (CanLII) at paras 22 – 27.
[46] *Ibid*.
[47] Canada, Department of Justice, *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples* (Ottawa: Minister of Justice and Attorney General of Canada, 2018) at page 7, 14 and 18.
[48] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para 66.

Vague Language, Flexible Strength?

The principle of the honour of the Crown has been called "semi-mystical", and a "magical invocation of the Crown's inherent virtues."[49] The archaic language of the concept has two practical effects. First, it obfuscates the principle and makes it challenging to apply directly to a given fact situation. Simpler and better understood language such as "duty", "fiduciary obligation", and "constitutional limit" would be easier to apply.

At the same time, couched as it is behind flowery language, the principle is not limited by any pre-conceived notions and can evolve in its application,[50] and is another reason why the concept is not the same as the fiduciary relationship when understanding Crown – Indigenous relations in Canada.[51] You may have noticed that there are more ways to besmirch the honour of the Crown then there are recognized duties arising out of it. This is an example of how the ancient principle, shrouded in antiquated language, has much room to develop in Canadian law.

Another benefit of the unusual language is in the political realm. "Claims to aboriginal title are woven with history, legend, politics and moral obligations."[52] Circumstances involving the honour of the Crown raise a political issue as much as a legal issue, perhaps forcing action in Parliament or a legislature.

Practical Considerations

The language of the *Fort McKay* decision about what "engages" or "implicates" the honour of the Crown is directed to whether the constitutional principle itself applies to the facts of the particular case. Once the court finds that the honour of the Crown applies, then the duty resulting from that can be identified.

From a practice perspective, the issue is whether the honour of the Crown gives rise to a legally enforceable duty. Duties are either performed or not. A duty can be enforced through an administrative law remedy such as *mandamus*, or if it is too late to prevent the breach, by a claim for damages for breach of the duty.

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[49] Mariana Valverde "The Honour of the Crown is at Stake": Aboriginal Land Claims Litigation and the Epistemology of Sovereignty at page 957.
[50] Mariana Valverde "The Crown in a Multicultural Age: The Changing Epistemology of (Post) Colonial Sovereignty" (2012) 21:1 Soc & Legal Stud 3 at page 8.
[51] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 105.
[52] *Kruger and al. v. The Queen*, 1977 CanLII 3 (SCC) at page 109.

The pleading would be that a duty has been breached, or is in danger of being breached. In support of that a Plaintiff could plead that the honour of the Crown gave rise to that particular duty. The focus of pleadings would usually be the specific duty, not the honour of the Crown itself. As already said, the honour of the Crown is not a cause of action. It is a constitutional principle that is the source of a duty.

Sometimes the facts lead directly to a duty, such as the fiduciary obligation found in *Guerin v. The Queen*.[53] In such a case it may be true that the honour of the Crown would also lead to a duty, but what does that add? The strength of a familiar case of breach of fiduciary obligation seems more potent than attempting to construct a duty out of the honour of the Crown, though there is probably no harm in throwing that into the pleadings in support.

International Comparison

Canadian jurisprudence on the honour of the Crown in Aboriginal law is some of the most developed in the world, but it is not alone. As already mentioned, New Zealand and the United States (where the reference is to "Congress" not the "Crown") are two jurisdictions which use the concept. There has been little traction for the concept in Australia, although that could change.[54] [55]

New Zealand, similar to Canada, it is a commonwealth country with a colonial history, gaining full independence from the UK in 1986. The relationship between the New Zealand Crown and the Maori is "an enduring relationship of a fiduciary nature akin to a partnership,"[56] but "the law of fiduciaries informs the analysis of the key characteristics of the duty… [b]ut it does so by analogy, not by direct application." [57]

The Treaty of Waitangi is a key source of duties in New Zealand and may limit the application of its case law in Canadian litigation. Duties stemming from the Treaty may not have much application in regions of Canada that are treaty-less. Importantly, the Treaty of Waitangi does not give rise to justiciable rights in and of itself. Duties have been limited to interpretation of treaty clauses expressly referenced in legislation.[58] This

[53] 1984 CanLII 25 [SCC].
[54] Kirsty Gover, "The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism" (2016) 38:3 Sydney Law Review 339 at page 360-361.
[55] *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677 at page 688.
[56] *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, at page 304 (Cooke JA).
[57] *New Zealand Maori Council v. Attorney General* [2008] 1 NZLR 318, at page 337 (O'Regan JA).
[58] Kirsty Gover, "The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism" (2016) 38:3 Sydney Law Review 339 at page 358.

does not mean that purely treaty-based duties won't arise in the future. New Zealand courts have called the Crown – Maori relationship *sui generis*[59] and anticipate the potential for a common law sources of duties.[60]

In the United States, few actionable duties have arisen exclusively from the 'benevolent intent of Congress.' Challenges to legislative action relying solely on their special trust relationship have been largely unsuccessful,[61] and this trust relationship does not give rise to monetary remedies.[62] Instead, in American caselaw a great number of federal statutes and regulations cover most aspects of the State-Indigenous relationship, providing actionable duties which have led to substantive relief.[63] A few rare decisions have found duties solely from the historic trust relationship. These include:

(a) A duty to protect Indian tribal land from trespass[64]
(b) A duty to exercise greater care when allocating water rights[65]
(c) A duty to ensure treaty rights are not violated by US Army Engineers[66]

Reconciliation

The Judgment of Greckol, J.A. in the *Fort Mckay* case ends with these words:

> The honour of the Crown has as its ultimate purpose the reconciliation of Aboriginal interests with Crown sovereignty… [T]he Crown must deal honourably with First Nations in negotiations designed to stave off infringement. The honour of the Crown may not mandate that the parties agree to any one particular settlement, but it does require that the Crown keep promises made during negotiations designed to protect treaty rights. It certainly demands more than allowing the Crown to placate FMFN [Fort McKay First Nation] while its treaty rights careen into obliteration. That is not honourable. And it is not reconciliation.[67] [68]

[59] *Paki No. 2, supra* note 10.
[60] Ibid at para 154 (Elias CJ): "whether the Crown is in breach of obligations derived from the common law as well as from the Treaty of Waitangi would require inquiry into the extent of the proprietary interest as a matter of custom"
[61] *Cohen*'s *Handbook*, *supra* note 11 at page 415.
[62] *Ibid* at page 423.
[63] *Ibid* at page 418.
[64] *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973).
[65] *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972).
[66] *Nw. Sea Farms v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996).
[67] *Fort Mckay, supra* note 1 at para 83.
[68] Thanks to Owen Leggatt Stewart for some of this research.